Was it unfair to dismiss an employee who refused to attend the workplace over concerns about the risk that Covid presented to his vulnerable children?

The Court of Appeal has upheld a decision that an employee was not automatically unfairly dismissed on health and safety grounds when he was dismissed for refusing to attend work during the first Covid lockdown.

What happened in this case?

Mr Rodgers worked for Leeds Laser Cutting Ltd. Following the announcement of the first lockdown on 23 March 2020, the Company told employees that the business would remain open but that it was putting in place measures to ensure the safety of individuals.

A risk assessment was carried out by an external professional, which made various recommendations relating to social distancing, wiping down surfaces and staggering start/finish/break times. In fact, the Company already had many of these measures in place prior to the risk assessment.

On 29 March 2020, Mr Rodgers sent a text message to his line manager saying that he would not return to work until the lockdown had eased because he had a young child with sickle cell anaemia who could become very ill if he caught the virus. In addition, he also had a seven-month-old baby who might have had the same health problems.

A month later Mr Rodgers was dismissed on the basis that he was absent without leave or explanation. He brought a claim for automatic unfair dismissal, arguing that he had been dismissed because he had exercised his right not to return to a workplace which he reasonably believed presented a serious and imminent danger to health and safety and which he could not reasonably have been expected to avert.

What was decided?

Decisions of the Employment Tribunal and the Employment Appeal Tribunal

The Employment Tribunal decided that Mr Rodgers had not been automatically unfairly dismissed.

It found that Mr Rodgers was concerned about the pandemic in general terms, but that he did not believe that there were circumstances of serious and imminent danger within the workplace. He had not voiced concerns about any dangers and in his text message to his line manager he did not identify any specific risks nor make any indication that he would return if improvements were made. Furthermore, his actions did not suggest he was particularly concerned, for example, he did not wear a face mask even though they were made available

to him, he left his home during a period of self-isolation, and he also worked in a pub during the lockdown.

The Tribunal went on to say that even if he had believed there to be such danger within the workplace, that belief would not have been reasonable. The workplace was large, with only a few people working at any one time, meaning it was not difficult to socially distance. An independent risk assessment had been carried out and there were reminders about the need for regular handwashing. Mr Rodgers acknowledged that this information had been communicated to him. And even if he had a such a belief and it had been reasonable, he could have taken steps to avert the danger, such as handwashing, mask wearing and social distancing.

Mr Rodgers appealed. The EAT upheld the Tribunal's decision and Mr Rodgers appealed again to the Court of Appeal.

Decision of the Court of Appeal

In a nutshell, Mr Rodgers argued that it was not necessary for the belief in a serious and imminent danger to be confined just to the workplace. Rather, it was sufficient for him to hold a belief that serious and imminent danger was at large in society.

The Court said that it would not be enough for the danger to arise only outside of the workplace, for example on the journey to work, noting that "…it is quite clear that the perceived danger must arise at the workplace". This did not necessarily mean that the danger has to be exclusive to the workplace – it could arise both inside and outside of the

workplace. However, the key requirement is that the employee has to believe that there is danger within the workplace itself.

The Court said that the Tribunal was entitled to find that Mr Rodgers did not hold such a belief, and that even if he had it would not have been reasonable. The appeal was dismissed.

What does this mean for employers?

The decision clarifies how health and safety dismissal claims will be approached by the Courts and Tribunals. Importantly, an employee will not be protected where the danger they are concerned about arises only outside the workplace. For example, if they did not want to attend work due to severe weather conditions or violent protests on the streets surrounding the workplace (however, the employer's general duties to take care of the health and safety of their employees would be relevant and may mean the employer needs to direct staff to stay away in such circumstances). We know that the danger must arise within the workplace, albeit that it may also arise outside of the workplace.

On the facts of this case, Mr Rodgers actions simply did not suggest that he believed that there was a danger in the workplace. Even if he had got over that hurdle, his claim would still have failed on the basis that it would have been unreasonable in light of the steps taken by the employer to mitigate the danger. The takeaway point here is that where an employer has taken appropriate health and safety measures, complied with relevant laws and guidance and engaged with employees about its strategy, it will be very challenging for an employee to get over the hurdle of showing that they had a

reasonable belief that there were circumstances of serious and imminent danger in the workplace.

It is worth remembering that Mr Rodgers did not have two years' service and so was unable to bring an "ordinary" unfair dismissal clam. This forced him down the route of having to show he was "automatically" unfairly dismissed on health and safety grounds (a claim which does not require two yeas' service). This was a higher hurdle and one that, on the facts of the case, Mr Rodgers could not meet. Had Mr Rodgers had been able to bring an ordinary unfair dismissal claim he may well have succeeded, and both the Tribunal and Court of Appeal suggested that this could have been the case. To avoid this, employers should always ensure that there is a potentially fair reason for dismissal and that a fair process is followed before deciding whether to dismiss.

Rodgers v Leeds Laser Cutting Ltd

BDBF is a leading law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.